CRIMINAL YEAR SEMINAR

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Webinar

Evidence Update

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2020–2021 Evidence Update

Presented by

The Hon. Crane McClennen

Retired Judge of the Maricopa County Superior Court

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OPINIONS AND MEMORANDUM DECISIONS
FROM THE
ARIZONA SUPREME COURT
ARIZONA COURT OF APPEALS

	Total	Memo.	Ops.	Not Crim.	Crim.
2017	2,213	2,023	190	114	76
2018	2,001	1,805	196	120	76
2019	1,552	1,414	138	89	49
2020	1,621	1,438	183	109	74

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ARTICLE 1. GENERAL PROVISIONS.

Rule 103(a). Rulings on Evidence—Preserving a Claim of Error.

Zaid, 249 Ariz. 154, 467 P.3d 279 (Ct. App. 2020): Zaid was convicted of manslaughter, aggravated assault, endangerment, disorderly conduct with a weapon, and unlawful discharge of a weapon; he contended the trial court improperly precluded evidence of the victim's character; state contended Zaid did not make sufficient offer of proof of victim's character.

103.a.090 To preserve for appeal a claim that the trial court erroneously **excluded** evidence, a party must make a **specific and timely objection,** and must make an **offer of proof** showing that the excluded evidence would be admissible and relevant unless the substance of the evidence is apparent from the context of the record.

¶¶ 8–10 Court held the substance of precluded testimony was clear: witnesses would have testified that the victim had a reputation for violence.

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Lelevier, 250 Ariz. 165, 476 P.3d 713 (Ct. App. 2020): Lelevier was convicted of first-degree murder; abandonment or concealment of a dead body; sexual exploitation of a minor under 15 years of age; surreptitious photographing, videotaping, filming, or digitally recording or viewing; and voyeurism; Lelevier contended trial court erred in excluding evidence that victim had used drugs.

¶ 18 Court held Lelevier failed to make an offer of proof to substantiate his basis for believing victim had used drugs.

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Lelevier contended trial court erred in admitting evidence that, in March 2017, the victim caught Lelevier taking photograph of her in her bathroom partially dressed. The trial court reasoned the evidence showing Lelevier took that photograph went to his motive and intent to kill J.G. in April and supported his knowledge, plan, and lack of mistake when engaging in the April 2017 conduct leading to the charges of voyeurism, sexual exploitation of a minor, and surreptitious photographing.

103.a.230 A party is not entitled to a reversal on appeal on the basis of erroneously **admitted** evidence that did not affect a substantial right of the party, and the prejudice to the **substantial rights** of the party will not be presumed, it must appear in the record.

¶¶ 11–14 Court held that, even without the other-act evidence, the trial evidence sufficiently established Lelevier's potential motive to murder J.G. and that he planned and executed the surveillance over the course of several weeks, therefore, any evidence suggesting Lelevier also attempted to photograph J.G. in her bathroom in March was undoubtedly not the persuasive factor upon which the jurors' guilty verdicts relied.

5

Soza, 249 Ariz. 13, 464 P.3d 696 (Ct. App. 2020): Soza was convicted of drug and false reporting offenses; the trial court had limited prosecution to impeaching Soza with only three of his many prior convictions; on direct examination, defense counsel asked Soza whether he had three prior felony convictions, and he responded in the affirmative; counsel asked Soza if he had take plea agreements in those cases, to which he answered, "Yes, I did"; state objected, and at sidebar trial court stated it would sustain objection; trial court did not inform jurors it had sustained objection, and defense counsel proceeded to different line of questioning without trial court's striking Soza's answer; Soza contended that, by sustaining state's objection, trial court improperly prevented defense counsel from rehabilitating his credibility by showing he had accepted responsibility in prior cases.

103.a.260 A party is not entitled to a reversal on appeal on the basis of erroneously **excluded** evidence that did not affect a substantial right of the party, and the prejudice to the **substantial rights** of the party will not be presumed, it must appear in the record.

¶ 26 Court noted jurors heard that Soza pled guilty for his previous convictions, and state did not ask trial court to strike answer; court concluded that, whether sustaining objection at sidebar was error was not an issue because it had no consequence in the trial.

6

Rule 104(A). Preliminary Questions — Questions of admissibility generally.

Devlin v. Browning, 249 Ariz. 143, 467 P.3d 268 (Ct. App. 2020): Devlin challenged judge Browning's reversal of the city court's grant of his motion to suppress evidence gained from a roadside DUI investigation following a traffic stop; the officer had testified that Devlin had bloodshot, watery eyes and smelled of alcohol; the officer conducted a "one pass" nystagmus test to determine whether the cause of Devlin's bloodshot watery eyes might be due to fatigue rather than alcohol consumption, and observed a lack of smooth pursuit in Devlin's left eye.

104.a.060 The trial court is not bound by the Rules of Evidence in determining admissibility of evidence, that evidence rules are not binding in a suppression hearing.

¶15 Court noted the dissent took special aim in particular at any consideration of the preliminary nystagmus test administered by the officer, finding it "unsettling"; court stated it was clearly another objective factor upon which the officer relied in assessing Devlin's condition, notwithstanding the city court's discrediting it as inadmissible evidence of guilt at trial; court stated the rules of evidence generally do not apply at suppression hearings and to an officer's reasonable suspicions based on training, experience, and common sense under field conditions.

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ARTICLE 2. JUDICIAL NOTICE

Rule 201(b) — Kinds of facts.

Farid, 249 Ariz. 457, 471 P.3d 668 (Ct. App. 2020): Farid was convicted of importation of marijuana into the state; he contended the superior court erred by instructing the jurors they could convict him without proof he imported marijuana "for sale"; at trial, Farid quoted to the trial court the Revised Arizona Jury Instructions (RAJI) Standard for importing marijuana, noting it required proof the marijuana was for sale.

201.b.125 An appellate court may take judicial notice of the Revised Arizona Jury Instructions.

¶ 9 n.2 Appellate court noted Farid's trial counsel did not identify which RAJI edition she was quoting, and took judicial notice of the language counsel quoted to the superior court was the same as used in the **outdated** Third edition RAJI.

¶ 10 n.3 Appellate court took judicial notice of the language used in the Fourth edition RAJI, which was **current** at the time of Farid's trial, does not include a "for sale" element in the crime of importing marijuana; court noted the statute prohibited the "[t]ransport for sale, import into this state or offer to transport for sale or import into this state" marijuana, and thus concluded § 13–3405(A)(4) does not require proof the defendant who knowingly imported marijuana did so "for sale," thus the instruction correctly stated the law.

8

Watson, 248 Ariz. 208, 459 P.3d 120 (Ct. App. 2020): Watson and an acquaintance, Maja Birkholz, hatched a scheme to steal money from Compass Bank customers, and Watson was convicted for one count of fraudulent schemes and artifices and seven counts of theft.

201.b.130 An appellate court may take judicial notice of its own records and the records of other courts.

¶ 8 n.2 Court took judicial notice that Birkholz had failed to appear and that the trial court had issued bench warrant for her arrest.

9

Reed, 2020WL8678504 (Ct. App. Oct. 20, 2020): Following Reed's conviction for voyeurism, the trial court ordered restitution to the victim for $17,909.50 in attorneys' fees. Among other issues, Reed contended the trial court did not determine whether the fees were reasonable, and asked the appellate court to take judicial notice of information about the victim's attorney and his law firm, as well as compensation for public defenders, some of which was obtained from the Internet.

201.b.120 An appellate court may take judicial notice of any fact of which a trial court could have taken judicial notice, even if the trial court was not requested to take judicial notice.

¶ 5 Court noted that none of the requested information was provided to the trial court, and that at the time of the restitution hearing, that information either was available to Reed's counsel (meaning, if relevant, it should have been provided to the trial court) or it was not available to Reed's counsel (meaning it could not have been considered by the trial court). Court held that, because the information was not provided to the trial court, it did not constitute the information adjudicative facts relevant to whether the trial court erred, and accordingly, denied the request to take judicial notice of the information.

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ARTICLE 4. RELEVANCY AND ITS LIMITS

Rule 401. Test for Relevant Evidence.

401.cr.010 For evidence to be relevant, it must satisfy two requirements: **First,** the fact to which the evidence relates must be of consequence to the determination of the action (materiality).

401.cr.020 For evidence to be relevant, it must satisfy two requirements: **Second,** the evidence must make the fact that is of consequence more or less probable (relevance).

Riley, 248 Ariz. 154, 459 P.3d 66 (2020): Riley and Kelly were inmates at the Arizona State Prison. Riley killed Kelly, and the state alleged Riley did so with the intent of gaining full membership into the Aryan Brotherhood. Riley contended evidence that Kelly was placed in protective custody was not relevant; state contended this evidence was admissible because Kelly had refused an order to commit violence against another inmate and that his prior protective custody status made him a target of the AB.

¶ 63 Court held this testimony allowed the state to establish Riley's motive for killing Kelly, thus Kelly's prior stay in protective custody was relevant.

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Riley contended this evidence was unfairly prejudicial.

403.cr.030 Because evidence that is relevant will generally be adverse to the opposing party, use of the word "prejudicial" to describe this type of evidence is incorrect and cannot be the basis for excluding evidence under this rule; evidence is "*unfairly* prejudicial" only if it has an undue tendency to suggest a decision on an improper basis, such as **emotion, sympathy,** or **horror.**

¶ 71 Court stated that, although this evidence likely undermined Riley's defense that he did not kill Kelly, it was not admitted to evoke "emotion, sympathy, or horror," and further stated not all harmful evidence is unfairly prejudicial; after all, evidence that is relevant and material will generally be adverse to the opponent.

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Rule 404(a)(2). Character of the victim.

Riley never admitted that he killed Kelly, in self-defense or otherwise, and instead his defense was that he found Kelly dead in his cell and tried to revive him, and thus claimed testimony about Kelly's character (he was one of the better inmates, always very polite, very easy to get along with, quiet) should not have been admitted.

404.a.2.cr.017 If the defendant offers evidence of a trait of the victim's violent character or claims self-defense, the state may offer evidence of the victim's peaceful character.

¶¶ 67 Court held that, because Riley never offered evidence of Kelly's violent character or claimed self-defense, trial court erroneously admitted evidence of victim's character, but concluded any error was harmless.

13

Rule 401. Test for Relevant Evidence: 401.cr.010 the fact to which the evidence relates must be of consequence to the determination of the action (materiality); **401.cr.020** the evidence must make the fact that is of consequence more or less probable (relevance).

Lelevier, 250 Ariz. 165, 476 P.3d 713 (Ct. App. 2020): Lelevier was convicted of first-degree murder; abandonment or concealment of a dead body; sexual exploitation of a minor under 15 years of age; surreptitious photographing, videotaping, filming, or digitally recording or viewing; and voyeurism. Lelevier contended the following evidence was not relevant: (1) although he typically paid for purchases with debit card, the day after victim's death, he withdrew cash from ATM and used that cash to purchase new shoes; (2) in the days before the killing, the victim's behavior was normal, energetic, and happy; (3) he told officers he had been assaulted 11 days after the victim's death;

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¶¶ 23–25 Court held shoe purchase evidence was relevant to the state's theory that shoe prints found in dirt near victim's body belonged to Lelevier and that he attempted to divert suspicion away from himself after killing victim.

¶¶ 26–27 Court held evidence of the victim's demeanor was relevant to state's theory that Lelevier had intended to frame the victim's death as suicide, but abandoned plan after killing her when he realized that story was implausible.

¶¶ 28–29 Court held evidence of Lelevier's statement about the assault was relevant to the state's principal case because it showed Lelevier's efforts to divert attention of police away from himself and toward third party, and Lelevier's affirmative attempts to divert investigators from suspecting him were relevant to show his consciousness of his guilt.

¶ 30 For prejudice under **Rule 403,** the trial court correctly noted evidence of the alleged assault had the potential to be either exculpatory, in the event the jurors believed the attack occurred, or to be directly inculpatory showing Lelevier's consciousness of guilt, thus, any possible prejudice introduced by this evidence was limited to the threat that the jurors would be more likely to find Lelevier guilty of the charged crimes, which is not forbidden by Rule 403.

15

Togar, 248 Ariz. 567, 462 P.3d 1072 (Ct. App. 2020): Togar was convicted of second-degree burglary. 97-year-old victim was in senior-living facility where someone was stealing money from him; as result, victim's daughter and son-in-law marked four $20 bills, photographed them, recorded serial numbers, and put them in victim's wallet, and installed a motion-sensor camera in the victim's room; next day, camera recorded person in that room; search revealed three $20 bills were missing, and video showed Togar in the victim's room; officer searched Togar and found three marked $20 bills; Togar contended trial court erred in admitting evidence of prior thefts from victim because there was no showing he was one who committed thefts.

¶¶ 19–21 Court held evidence of prior thefts was relevant because it showed the reason victim's family acted as it did and helped jurors understand video evidence of Togar's committing this crime and the marked bills found on his person; further, absent evidence of prior thefts, family's conduct may have seemed irrational and paranoid, thus evidence substantiated their credibility as key prosecution witnesses, which court held was material and relevant on its own; and under **Rule 403,** evidence did not have undue tendency to suggest decisions based on emotion, sympathy, or horror.

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Rule 404(b). Other crimes, wrongs, or acts.

Togar contended trial court erred in admitting evidence of prior thefts from the victim because there was no showing he was one who committed the thefts

404.b.cr.103 If evidence shows someone other than the defendant committed the other act, then Rule 404(b) does not apply.

¶¶ 18–19 Court held that, because there was no claim that Togar committed the prior thefts from the victim, Rule 404(b) did not apply, and admissibility would be determined under **Rule 401.**

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Rule 404(a)(2). Character of the victim.

Zaid, 249 Ariz. 154, 467 P.3d 279 (Ct. App. 2020): As the result on a death during a bar fight, Zaid was convicted of manslaughter, aggravated assault, endangerment, disorderly conduct with a weapon, and unlawful discharge of a weapon. Zaid contended trial court erred in precluding reputation evidence of victim's violent character.

404.a.2.cr.010 The defendant in a criminal case is permitted to offer evidence of a trait of the victim's character provided that trait of character is pertinent to the litigation, such as when the defendant raises a justification defense.

404.a.2.cr.013 When a criminal defendant raises a justification defense, the defendant is entitled to offer proof of the victim's reputation for violence, even if the defendant did not know about that character.

¶¶ 18–21 Court held that, because Zaid claimed self-defense and it was unclear who was the first aggressor, evidence of the victim's violent character was admissible, thus the trial court erred in excluding that evidence, and because error was not harmless, Zaid was entitled to **a new trial.**

18

Rule 404(b). Other crimes, wrongs, or acts.

Zaid contended trial court erred in precluding evidence of the victim's prior acts of violence.

404.b.cr.200 Extrinsic evidence of another crime, wrong, or act is admissible if it shows **credibility**.

¶¶ 12–17 Court stated evidence of a victim's other acts is admissible for credibility to show the defendant's version of events was credible, but that Zaid did not point to any details of victim's prior violent conduct that presented substantial similarities to Zaid's account, nor did Zaid claim to have recounted specific similarities before he had opportunity to fabricate account consistent with them, and thus held Zaid did not show that the victim's prior violent acts were relevant to corroborate his version of events and rebut a claim of fabrication.

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ARTICLE 5. PRIVILEGES

Rule 501. Privilege in General — Physician-Patient Privilege.

501.05.020 For information not subject to *Brady,* the physician-patient privilege does not yield to the request of a criminal defendant for information merely because that information may be helpful to the defendant's defense; to be entitled to an *in camera* review of privileged records as a matter of due process, the defendant must establish a **[reasonable possibility] [substantial probability]** that the protected records contain information critical to an element of the charge or defense, or that their unavailability would result in a fundamentally unfair trial.

State ex rel. Romley v. Superior Ct. (Roper), 172 Ariz. 232, 836 P.2d 445 (Ct. App. 1992): Defendant wife was charged with aggravated assault on husband; Court upheld trial court's order for *in camera* review of husband's medical records.

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Connor, 215 Ariz. 553, 161 P.3d 596 (Ct. App. 2007): Connor was charged with killing the victim; Court upheld trial court's denial of Connor's request for production of the victim's medical records; ¶ 10: **reasonable possibility.**

Sarullo, 219 Ariz. 431, 199 P.3d 686 (Ct. App. 2008): Sarullo was charged with aggravated assault on girlfriend; Court upheld trial court's denial of Sarullo's request for production of the victim's medical/counseling records; ¶ 20: **reasonable possibility.**

Kellywood, 246 Ariz. 45, 433 P.3d 1205, ¶¶ 7–10 (Ct. App. 2018): Kellywood was charged with sexual conduct with adopted daughter; Court upheld trial court's denial of Kellywood's request for production of the victim's medical/counseling records; ¶ 8: **reasonable possibility;** ¶ 30: Dissent states majority is essentially requiring showing of **substantial probability.**

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R.S. v. Thompson (Vanders), 247 Ariz. 575, 454 P.3d 1010, ¶¶ 9–28 (Ct. App. Nov. 21, 2019) (Vanders was charged with killing his girlfriend; trial court ordered hospital to disclose deceased victim's privileged mental health records for *in camera* review; court held Vanders did not establish **substantial probability** that the protected records contained information critical to an element of the charge or defense, or that their unavailability would result in a fundamentally unfair trial, thus trial court erred by granting *in camera* review. **Rev. granted 8/25/2020.**

Dunbar, 249 Ariz. 37, 465 P.3d 527, ¶¶ 23–29 (Ct. App. Apr. 29, 2020) (Dunbar was charged with attempted murder of his ex-girlfriend; Dunbar sought victim's medical records from Pennsylvania, Maryland, and Arizona; court held Dunbar did not provide a sufficiently specific basis for requiring the victim to produce her medical records and thus failed to establish a **reasonable possibility** that the protected records contained critical information. **Rev. denied 12/15/2020.**

Fox-Embrey v. Neal (Main), 249 Ariz. 162, 467 P.3d 1102, ¶¶ 17–63 (Ct. App. Jun. 4, 2020) (Main was charged with murder and child abuse of her adopted children; Main sought medical and therapeutic records in DCS file; court concluded Main sustained her burden of establishing a **reasonable possibility** that the protected records contained critical information, thus showing she was entitled to *in camera* review of records. **Rev. continued 2/02/2021.**

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Attorney-Client Privilege.
Clements v. Bernini, 249 Ariz. 434, 471 P.3d 645 (2020): Clements challenged the trial court's order appointing a special master to conduct an *in camera* review of recordings of jail phone calls. The state had requested the review in connection with its investigation of Clements, who was then incarcerated at the Maricopa County jail.

501.07.045 A party claiming the attorney-client privilege must make a prima facie showing supporting that claim; upon such a showing, the trial court may hold a hearing to determine whether the privilege applies, but the court may not invade the privilege to determine its existence, even *in camera* using a special master; once the privilege has been established, a party attempting to set it aside under the crime-fraud exception must demonstrate a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies; only then may a special master review the privileged communications.

¶ 18 Court stated the State conceded it cannot meet its burden to show the crime-fraud exception applied, thus absent new evidence, if the court determines the privilege applies, the state may not review the recordings between Clements and his attorney.

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ARTICLE 6. WITNESSES

Rule 615. Excluding Witnesses.

Hamilton, 249 Ariz. 303, 468 P.3d 1264 (Ct. App. 2020): Hamilton was charged with sexual conduct with a minor and six counts of molestation of a child; state gave notice it intended to call three women under Rule 404(c) from a 2000 case; trial court denied Hamilton's request to interview those women.

615.027 Although a victim has the right to be present throughout all criminal proceedings in which the defendant has the right to be present, if a victim from a prior proceeding is going to called as a witness in a subsequent proceeding pursuant to Rule 404(c), that victim is subject to exclusion under Rule 615.

¶¶ 14–26 Court held that, because Hamilton was still under obligation to register as sex offender in the 2000 case, the women were still considered "victims" and thus had right to refuse to be interviewed, but because they were going to be called as witnesses, they were subject to exclusion under Rule 615; court concluded, however, that any error in allowing them to be present was harmless.

Ariz. Const. art. 2, sec. 2.1(A)(3). Victim's rights — Right to be present. az.2.2.1.a.3.040

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ARTICLE 7. OPINION AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses.

Riley, 248 Ariz. 154, 459 P.3d 66 (2020): Riley contended trial court erred in allowing corrections officer to testify that, on the night of killing, as Riley and another inmate were exiting C Pod, she saw Riley pat the inmate on shoulder "kind of atta-boying him" and that Riley looked "happy"

701.a.010 A witness who is not testifying as an expert may give testimony in the form of an opinion only if the opinion is rationally based on the witness's perception.

701.b.020 A witness who is not testifying as an expert may give testimony in the form of an opinion only if the opinion would be helpful to clearly understanding the witness's testimony or to determining a fact in issue, and not merely tell the trier-of-fact how to decide the case.

¶¶ 75–76 Court held the officer's testimony was rationally based on her own perception that Riley's smile and pat on back were congratulatory, and because Riley contended he was in the housing pod the night of murder to warn victim of a killing plot and that he panicked once he saw the victim was dead, the officer's testimony assisted jurors in determining this fact because her description of Riley's behavior was inconsistent with a panicked person (as Riley claimed to be) and tended to prove the state's theory of case; further, contrary to Riley's claim, the jurors were not in same position as the officer to discern significance of Riley's "atta-boy" or "happy" expression because she was the only percipient witness to interaction; thus trial court did not err in admitting officer's testimony.

25

Rule 702(a). Testimony by Expert Witnesses—Assist trier of fact.

Smith, 250 Ariz. 69, 475 P.3d 558 (2020): Smith contended trial court erred in allowing the state's expert witness to question opinions of Smith's expert witness.

702.a.050 Although an expert may not give an opinion about the accuracy, reliability, truthfulness, or credibility of another person or witness, a witness may disclose to jurors those facts that caused the witness not to believe the other person or witness.

¶¶ 134–35 Court held it was not improper for the state's expert to question Smith's expert's qualifications or his conclusions about the affect prior abuse had on Smith.

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Rule 702. Testimony by Expert Witnesses.

Conner, 249 Ariz. 121, 467 P.3d 246 (Ct. App. 2020): Conner contended trial court erred by failing to complete the pre-trial evidentiary hearing before determining the expert's testimony was admissible and should have allowed him to complete his cross-examination at that hearing.

702.008 The trial court has discretion whether to set a pre-trial hearing to evaluate proposed expert testimony and may properly decide to hear the evidence and objections during the trial.

¶ 31 Court noted trial courts have discretion to hold a pre-trial evidentiary hearing to address admissibility of expert witness testimony and that Conner had the opportunity to cross-examine the expert at trial; and held Conner failed to show any error in the pre-trial evidentiary proceedings affected admissibility of the expert's testimony.

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Rule 702(b). Testimony based on sufficient facts or data.

Conner**:** State's expert testified about cell phone information. Conner claimed the expert's opinion was based on insufficient facts and data, and thus inadmissible, specifically contending the expert lacked key for T-Mobile cell site location information (CSLI), Azimuth information, switch information, key to second set of CSLI, and location information of "TracFone."

702.b.010 A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the testimony is based on sufficient facts or data.

¶¶ 25–28 Court noted the expert's trial testimony included explaining how he reached his conclusion and opportunity for significant cross-examination by Conner, and further noted, during that cross-examination, he was never asked about this information and was never asked how any lack of information affected his opinions, and more specifically, cross-examination did not address how missing Azimuth information or key to either set of CSLI affected his opinions, and further noted that, at no point, during pre-trial hearing or at trial, did Conner challenge quality of the expert's opinions because he lacked this other data; court held Conner failed to show facts and data available to the expert were so insufficient that it rendered his opinion inadmissible.

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Rule 702(d) — Reliably applied principles and methods.

Conner noted state's cell phone expert was state's third cell phone expert and that each expert had analyzed same data and applied essentially same methodology, but had come to different conclusions, and thus contended expert's opinion lacked key element of being reliable.

702.d.010 A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the expert has reliably applied the principles and methods to the facts of the case.

¶¶ 29–30 Court stated that, other than broadly claiming state's experts came to different conclusions over time, Conner failed to show what flaws in expert's work made his opinions unreliable, and that mere differences in conclusions do not require preclusion of expert evidence, leaving it to jurors to determine weight and credibility of testimony; and thus held Conner failed to show expert's testimony was so unreliable that it required exclusion.

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ARTICLE 8. HEARSAY

Rule 801 — Confrontation Clause.

Stuebe, 249 Ariz. 127, 467 P.3d 252 (Ct. App. 2020): Triggered by a motion detector, a security camera recorded a burglary in progress and sent an email and video recording to the security company. Stuebe contended that the email and video were inadmissible hearsay and introducing that evidence violated the Confrontation Clause of the Sixth Amendment.

801.005 In order for an out-of-court statement to be considered "testimonial evidence," the declarant must have made the statement to an agent of the state.

801.006 In order for an out-of-court statement to be considered "testimonial evidence," the declarant must have made the statement for the purpose of litigation or under circumstances the declarant would reasonably expect to be used prosecutorially.

¶¶ 14–15 Court noted the email and video recording were not sent to law enforcement and were not made in anticipation of criminal prosecution, and Stuebe was able to cross-examine the property manager about the email and video recording, and thus held admission of the email and video recording did not violate Stuebe's confrontation rights.

30

Rule 801(a) — Statements that are not hearsay; Statement.

Stuebe contended email and video were hearsay.

801.a.003 "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion, and "person" as defined in A.R.S. § 1–215(28) and § 13–105(30) does not include an automated email or a "machine-produced" video recording attached to the email.

¶¶ 1, 9–12 Court held the automated email and machine producing video were not a "person," thus email and video recording attached to email were not hearsay because they were not made by a person.

31

Rule 801(d)(2)(A) —Statements that are not hearsay: Party-opponent's own admission.

Gill, 248 Ariz. 274, 459 P.3d 1209 (Ct. App. 2020): Gill contended his possession of methamphetamine was not proved because no evidence corroborated his admission that he possessed "less than a quarter gram" of methamphetamine within the residence.

801.d.2.A.060 The *corpus delicti* doctrine ensures a defendant's conviction is not based upon an uncorroborated confession or incriminating statement, thus state must show (1) a certain result has been produced, and (2) the result was caused by criminal action rather than by accident or some other non-criminal action; only a reasonable inference of the *corpus delicti* need exist before the jurors may consider the statement, and circumstantial evidence may support such an inference; furthermore, the state need not present evidence supporting the inference of *corpus delicti* before it submits the defendant's statement as long as the state ultimately submits adequate proof of the corpus delicti before it rests.

¶¶ 7–8 Court noted there was considerable evidence corroborating Gill's admission and supporting his conviction: In the area of the residence with Gill's possessions, police found a methamphetamine pipe and bag containing syringe; a few steps from that area was a bag containing methamphetamine and various drug paraphernalia including packaging seals, syringes, and another methamphetamine pipe; court thus held there was substantial evidence in addition to Gill's incriminating statements from which the jurors could find beyond reasonable doubt that Gill possessed methamphetamine found in the residence.

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Rule 804(b)(1). Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness — Former testimony.

Sahagun-Llamas, 248 Ariz. 120, 458 P.3d 875 (Ct. App. 2020): Trial court held a trial lasting 7 days; after Sahagun-Llamas testified, he absconded and was subsequently arrested 13 years later; upon review, it was discovered the court reporter had not transcribed the 4th day of trial (when two of Sahagun-Llamas's witnesses testified); neither trial court nor attorneys could recall what testimony was that day; court concluded trial court's efforts to reconstruct record were not sufficient for a meaningful appeal, and so ordered **a new trial.**

804.b.1.020 An exception to the confrontation clause exists when the witness is unavailable but has previously testified at a judicial proceeding, subject to cross-examination, against the same defendant.

¶ 31 Court stated that, for any witness the state might be unable to locate for the second trial, state could use transcribed testimony from the first trial.

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ARTICLE 9. AUTHENTICATION AND IDENTIFICATION

Rule 901(a). Authenticating and Identifying Evidence — General provision.

***Stuebe*:** Court noted machine-produced statements may present other evidentiary concerns.

901.a.010 For the matter in question to be admissible in evidence, the proponent need only present sufficient evidence from which the trier-of-fact could conclude the matter in question is what the proponent claims it to be; whether the matter in question is in fact what the proponent claims and whether it is connected to the litigation is a question of weight and not admissibility, and is for the trier-of-fact.

¶ 13 Court noted trial court denied Stuebe's authentication objection to the video, but Stuebe did not raise that issue on appeal; court cited a federal case that stated concerns about machine-generated statements should be addressed through the process of authentication and not by hearsay or Confrontation Clause analysis.

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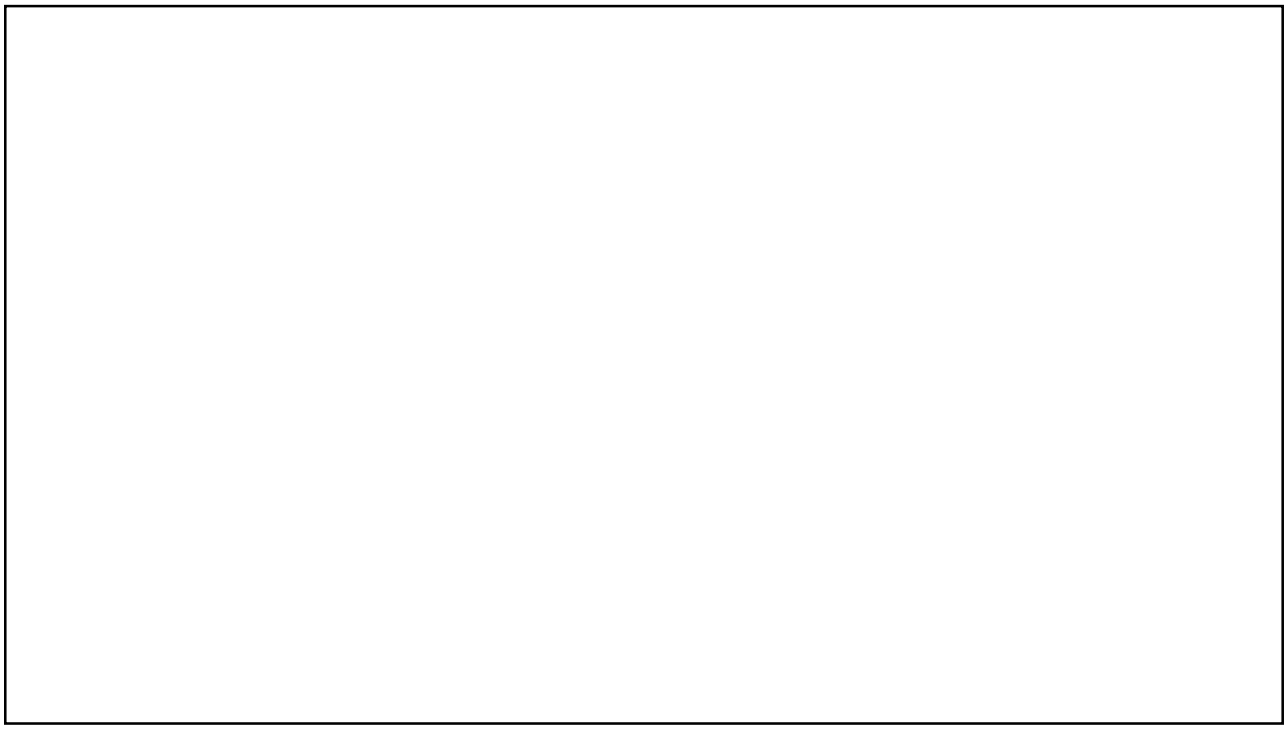

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